STATE OF MICHIGAN

COURT OF APPEALS

STANLEY MICHALSKI,

Plaintiff-Appellee,

v

DAVID WHEAT and MARILYN WHEAT,

Defendants-Appellants.

UNPUBLISHED
October 15, 1999

No. 212934
Wayne Circuit Court
LC No. 97-724553 NO

Before: Doctoroff, P.J., and Holbrook, Jr. and Talbot, JJ.

PER CURIAM.

Defendants appeal by leave granted from an order denying their motion for summary disposition in this breach of contract and tort action brought by plaintiff. We reverse.

Plaintiff was on defendants' premises performing roofing repairs when he allegedly suffered injury due to a ladder on the premises. Plaintiff filed suit alleging premises liability and negligence, nuisance and breach of third-party beneficiary contract. Defendants contend that the trial court erred in denying their motion for summary disposition of the negligence/premises liability claim. We agree. "The Court reviews summary disposition decisions de novo to determine whether the prevailing party was entitled to judgment as a matter of law." *Hughes v PMG Building, Inc*, 227 Mich App 1, 4; 574 NW2d 691 (1997).

In *Reeves v Kmart Corp*, 229 Mich App 466, 471; 582 NW2d 841 (1998), this Court set forth the standard regarding liability of an employer who retains the services of an independent contractor:

> The general rule is that an employer of an independent contractor is not liable for the contractor's negligence. However, the Supreme Court has provided two exceptions for this general rule. A party may be liable for the negligence of an independent contractor where the party retains and exercises control over the contractor or where the work is inherently dangerous. [Citations omitted.]

In the present case, plaintiff testified that he "believed" that defendants were his employer. However, a party opposing a motion for summary disposition must present more than mere conjecture and speculation to satisfy the evidentiary burden of proof of establishing a genuine issue of material fact. *Libralter Plastics, Inc v Chubb Group*, 199 Mich App 482, 486; 502 NW2d 742 (1993). "A conjecture is simply an explanation consistent with known facts or conditions, but not deductible from them as a reasonable inference." *Id.* Plaintiff concluded, in his deposition, that defendants effectively hired him because it was defendants' home which required the work. However, plaintiff's conclusion is not deductible as a reasonable inference from the facts. Therefore, defendants are not liable to plaintiff when they employed David Alexander as an independent contractor. *Reeves, supra* at 471.

Alternatively, plaintiff contends that defendants retained control over the roofing project by directing the course of the work and representing to "the city" and "the government" that defendants were responsible for the roofing job, and therefore, the retained control exception to the general rule acts to impose liability on defendants. However, plaintiff failed to establish with documentary evidence that such violations occurred. A disputed fact must be established by admissible evidence, and opinions, conclusory denials, unsworn averments and inadmissible hearsay do not satisfy the burden. *SSC v Detroit Retirement System*, 192 Mich App 360, 364; 480 NW2d 275 (1991). Plaintiff has the burden of proof in demonstrating that an issue for trial exists. MCR 2.116(G)(4). Plaintiff has failed to provide an affidavit or other documentary evidence from a government official, local, state or federal, to indicate that defendants failed to comply with the licensing requirements or made misrepresentations in order to obtain a permit application in violation of the permit requirements. Accordingly, plaintiff's contention that the exception of retained control to the general rule was demonstrated by defendants' alleged violations of local, state and federal law is without merit.

Plaintiff also contends that defendants retained control because defendant David Wheat directed the roofing activities. However, in deposition, plaintiff admitted that defendant David Wheat did not direct the day to day activities of the roofing. Defendant David Wheat merely directed where the vents would be located on the roof. Plaintiff contends that the retention of control required to impose liability is minimal, in fact, control which is retained, but never exercised, is sufficient. However, in *Plummer v Bechtel Construction Co*, 440 Mich 646, 660-661; 489 NW2d 66 (1992) (opinions of Levin, J., and Boyle, J.), the Supreme Court held that:

> The mere presence of one hundred twenty-five Edison employees at the site does not indeed, necessarily mean that Edison retained control of the work. As set forth in comment (c) to Sec. 414 of volume 2, the Second Restatement of Torts, an owner or general contractor who "has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed" would not be deemed to have retained control. *Edison would not have retained a right of control by merely overseeing the project and monitoring general progress to ensure compliance with contract specifications*. [Emphasis added.]

In the present case, the only evidence of defendant David Wheat's exercise of control was his direction of the location of the vents on the roof. The general right to exercise control is insufficient to find that

one has retained control. *Plummer, supra* at 660-661; *Phillips v Mazda Motor Mfg Corp*, 204 Mich App 401, 408; 516 NW2d 502 (1994). Accordingly, the trial court erred in concluding that a factual issue exists regarding defendant David Wheat's control over the roofing work.

Defendants contend that the trial court erred in denying summary disposition where defendants ceded possession and control of the premises. We agree. In *Anderson v Wiegand*, 223 Mich App 549, 551-552; 567 NW2d 452 (1997), the defendants cleared snow from the driveway and walkway surrounding their home. The defendants departed from the premises to visit an out-of-state relative. The following day, the defendants' real estate agent held an open house at the defendants' home. The defendants had left a key with the real estate agent. The plaintiff was on the walkway leading to the defendants' home when she allegedly slipped and fell. The plaintiff filed suit to recover for her injuries. This Court held that summary disposition was proper in favor of the defendant homeowners because they had ceded possession and control of their premises:

> Generally, this duty of care is owed by both the invitor who solicits business and the possessor of the premises. *Merritt v Nickelson*, 407 Mich 544, 551; 287 NW2d 178 (1980). Invitors are liable for dangerous conditions that might be discovered with reasonable care. *Id.* However, premises liability is conditioned upon the presence of both possession and control over the land because the person in possession is in a position of control and normally best able to prevent any harm to others. *Id.* at 552, 287 NW2d 178. Possessory rights can be "loaned" to another, thereby conferring the duty to make the premises safe while simultaneously absolving oneself of responsibility. *Id.* at 553, 287 NW2d 178.
>
> Here, the homeowners took reasonable measures within a reasonable time after the accumulation of snow to diminish the hazard of injury to Mrs. Anderson. The homeowners then ceded possession of the premises to the realtor, a responsible individual, for the purposes of conducting the open house as is common in the real estate industry. The realtor was an independent contractor operating pursuant to a contract with the homeowners. Pursuant to the general rule that an employer of an independent contractor is not liable for the contractor's negligence, *Phillips v Mazda Motor Mfg (USA) Corp*, 204 Mich App 401, 405-406; 516 NW2d 502 (1994), we find that the homeowners were not liable for any negligence of the real estate agent. Because the homeowners effectively ceded possession and control of the premises, albeit for a brief time, to the real estate agency, the law is satisfied to look to the party actually in control for liability for injuries to third parties. *Merritt, supra* at 554, 287 NW2d 178. Thus, under the facts of this case, the homeowners may not be held liable for the alleged negligence of their agent. *Merritt, supra*; *Phillips, supra*. We therefore affirm the order granting summary disposition to the homeowners, although on different grounds than those articulated by the trial court. [*Anderson, supra* at 555-556.]

In the present case, defendants relied on the expertise of Alexander for roof repair. Defendants ceded possession and control of the premises because they did not remain on the property for the duration of the repairs nor direct the day to day activities. Because plaintiff failed to present documentary evidence

of retention and control of the premises, the trial court erred in denying defendants' motion for summary disposition of this count. See also *Orel v Uni-Rak Sales Co, Inc,* 454 Mich 564, 568-570; 563 NW2d 241 (1997); *Merritt, supra* at 552-553.

Defendants also contend that the trial court erred in denying defendants' motion for summary disposition of the nuisance claim. We agree. Michigan law recognizes two types of nuisance, public or private. A private nuisance consists of an unreasonable invasion of a property owner's right to the enjoyment and use of his property. A public nuisance is an unreasonable interference with a right common to the general public which harmed plaintiff in a manner different than that of the general public. *Adkins v Thomas Solvent Co*, 440 Mich 293, 302-306 n 11; 487 NW2d 715 (1992); *Cloverleaf Car v Phillips*, 213 Mich App 186, 190-193; 540 NW2d 297 (1995). Because plaintiff has failed to assert an invasion of his rights in land, the only claim which may be raised is one of public nuisance.

"A defendant is liable for a nuisance where (1) the defendant created the nuisance, (2) the defendant owned or controlled the land from which the nuisance arose, or (3) the defendant employed another to do work from which the defendant knew a nuisance would likely arise." *Cloverleaf, id.* at 191. In the present case, there is no evidence that defendants created the nuisance by providing the ladder for the roofing workers to use. Defendants owned the land, however, they ceded possession and control of the land to Alexander based on his expertise. Lastly, there is no evidence that defendants knew that a nuisance would arise by the placement of a ladder on their premises.

Additionally, in *Sanford v City of Detroit*, 143 Mich App 194, 200; 371 NW2d 904 (1985), this Court held that a possessor of land is subject to liability for an abatable artificial condition on land if the possessor knew of the condition, knew that the condition existed without the consent of those affected and failed to take reasonable steps to abate the condition. In the present case, there is no evidence that defendants knew of any risk due to a ladder on their premises. Furthermore, the ladder was on the premises with the consent of the workers who required the ladder to perform their duties. Accordingly, plaintiff's claim of nuisance fails, and the trial court erred in denying defendants' motion for summary disposition.

Lastly, defendants contend that the trial court erred in denying summary disposition of the negligent selection of a contractor claim. We agree. Michigan does not recognize such a cause of action. *Reeves, supra* at 475-476. Furthermore, plaintiff failed to establish that he was a third-party beneficiary to the contract between defendants and Alexander.

Reversed.

/s/ Martin M. Doctoroff
/s/ Donald E. Holbrook, Jr.
/s/ Michael J. Talbot